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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 388.

O/Y WIPU, as owner of the Finnish steamer WILJA,
Petitioner,

against

LOUIS LOUIS DREYFUS, JEAN LOUIS DREYFUS, PIERRE LOUIS DREYFUS and FRANCOIS LOUIS DREYFUS, co-partners, doing business under the firm name and style of LOUIS DREYFUS & CO.,
Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HENRY E. OTTO,
Counsel for Respondents.

SAMUEL C. OTTO,
of Counsel.

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Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The final decree in admiralty, declining jurisdiction and dismissing the libel, was reversed by the Circuit Court of Appeals for the Second Circuit for error of law in relegating the parties to arbitration in London and because of the great hardship caused to respondents by the District Court's declination of jurisdiction (C. C. A. Op. p. 147).

Respondents, a French co-partnership, doing business in New York, filed a libel to recover damages for breach of contract of charter of the Finnish steamship Wilja

Note: Emphasis is ours throughout, unless otherwise indicated.

and attached the said steamship under writ of foreign attachment (C. C. A. Op. p. 143).

The petitioner moved that the Court decline jurisdiction of the suit and also dismiss the libel on the ground that it did not state facts sufficient to constitute a cause of action and that the Court lacked jurisdiction of the suit (C. C. A. Op. p. 145).

Upon the said motions the District Court declined jurisdiction and relegated the parties to arbitration in London (Op. 235*), in reliance upon an alleged oral and disputed statement by proctor for petitioner that petitioner would appear in arbitration proceedings in London upon termination of the proceedings here (Op. Vol II. 377-8).

Respondents moved for reargument and, upon such reargument, for an order conditioning the Court's declination of jurisdiction by requiring petitioner to appear and file security in the arbitration proceeding in London (to which the parties had been relegated), or, in the alternative, that the District Court retain its jurisdiction but stay the within action pending the hearing and determination of the arbitration in London (237, 239).

The District Court declined respondent's motion for reargument and entered its final decree.

The Circuit Court of Appeals reversed the final decree and remanded the cause to the District Court with directions to exercise its discretion in regard to the retention of jurisdiction, and, if it should determine to retain jurisdiction, to decide the cause on the merits (C. C. A. Op. p. 147).

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* References are to folio numbers of Volume I of the Record. References to Volume II will be designated as "Vol. II— ".

Facts.

On August 17, 1939, a contract of charter of the S/S Wilja, in writing, was entered into by and between the New York office of the respondents, designated therein as "Louis Dreyfus & Co., of New York," and the petitioner. A photostatic copy of the said contract is attached to the libel and marked Exhibit "A" (R. p. 28).

Thereafter the value of chartered freight space substantially increased and the petitioner failed and refused to furnish the S/S Wilja for the loading of respondents' cargo, and, while the S/S Wilja was at New York, endeavored to obtain cargoes from other shippers at higher freight rates (Libel, 65, 66; 190-192; 216). Respondents thereupon commenced an action in admiralty in the District Court for the Eastern District of New York against petitioner for breach of said contract and obtained jurisdiction over petitioner by attachment of said vessel (Libel, 67; 191, 192).

On November 18, 1939, and while the aforesaid action was pending in said court, respondents and petitioner agreed to an amendment (Exhibit B annexed to the libel; 85-87), of the aforesaid charter, by the terms of which respondents agreed to pay approximately twice the original freight and consented to the immediate release of the S/S Wilja from attachment and petitioner agreed to cause the said S/S Wilja to sail and proceed forthwith from the port of New York to St. Lawrence loading ports and there load respondents' cargo (Libel, 68-70; 192-194, Exhibit "D" annexed to this brief).

Although respondents did immediately, and on the morning of November 18, 1939, formally consent to the discontinuance of the action then pending in the District Court and to the release of the S/S Wilja from attachment, petitioner failed to cause the S/S Wilja to sail forthwith from the port of New York as agreed, and the

S/S Wilja never sailed to and never loaded respondents' cargo at St. Lawrence ports or any other ports (Libel, 71, 72; 194).

While the S/S Wilja left New York about noon on November 20, 1939, it returned to New York the following day (194).

Before the libel herein was filed, and while the S/S Wilja was still at the port of New York, petitioner wholly repudiated the charterparty and in writing on December 15, 1939, insisted that the voyage was frustrated by the closing of the St. Lawrence River for the winter, refused to load at New York or other U. S. Atlantic ports, declared the charterparty terminated, and suggested that respondents immediately institute any action they might intend to bring (195, 196; C. C. A. Op. pp. 146-147; Exhibit "C" annexed to this brief). The within action was commenced by respondents promptly after receipt of the said notice of termination.

On or before December 29, 1939, the S/S Wilja was chartered by petitioner to others for a voyage from New York to Antwerp and/or Rotterdam (the ports of destination provided for in the charter as amended November 18, 1939) (Libel, Exhibit "B"; fols. 85-87), at a net freight of approximately $100,000 (*about $84,800 more than the freight provided for in respondents' charter of August 17, 1939, and about $68,800 more than the freight provided for by the amendment of November 18, 1939)* (218-224; 227).

The petitioner repudiated the contract of charter and wholly failed and refused to commence performance of either the contract of August 17, 1939, or the contract as amended November 18, 1939 (Libel, 65-66, 71-72; 169; 223), as the Circuit Court of Appeals has specifically found (C. C. A. Op. pp. 146, 147).

Upon the motions before the District Court *petitioner denied the very existence of the contract of charter sued upon* (Statt, 106).

The Parties.

A. *Louis Dreyfus & Co.*

Respondents have transacted business in New York and the rest of this country on a substantial basis for the past thirty years, being one of the largest exporters of United States grain (183).

The principal office in the United States is located at No. 2 Broadway, New York City, and is managed by Fernand Leval, a citizen of the United States, under written power of attorney to act for the respondents and to do in behalf of the American business of respondents, anything that respondents themselves could do (181, 182).

Respondents, for many years, have been members of fourteen leading grain and commercial Exchanges in the United States and have owned a grain elevator in the City of Minneapolis (184, 185).

Respondents pay substantial income and other taxes to the United States government as well as to the State of New York and other States (186).

The grain intended to be loaded by respondents into petitioner's S/S Wilja consisted in whole or in part of United States grain (189).

Certificate of transacting business as a co-partnership had been duly filed with the County Clerk of New York County prior to commencement of the within action (153-159; 186).

B. *O/Y Wipu.*

The petitioner is a corporation created, organized and existing under and by virtue of the laws of Finland (97), having an agent in the City of New York (Statt, 117).

The Contract of August 17, 1939 and the Contract as Amended November 18, 1939.

The contracts (Exhibit "A" and as amended Exhibit "B") are annexed to the libel (R. pp. 28, 29). They were signed in London on behalf of the New York office of Louis Dreyfus & Co. (187, 188). The charter, Exhibit "A," specially designates "Louis Dreyfus & Co., of New York" as Charterers (R. p. 28, lines 7, 8), and specifically provides that

> "Orders as to loading port to be given *on receipt of Master's application to* 'SESOSTRIS-NEW YORK' * * *" (Sesostris-New York being the cable address of respondents' New York office).

They were signed on behalf of the petitioner by H. Clarkson & Co., Ltd. (cabling brokers with authority limited to written or cable instructions from the petitioner) (249, 250).

The Real Questions Involved.

The real questions before this Court are:

1. Whether a ship owner, *who has wholly repudiated its* original *contract* of charter as well as its amended contract (even though the latter provided for twice the original freight), has failed and refused to enter upon the performance of either of said contracts, *and who has denied the very existence of the contract of charter sued upon* (Statt, 106), may demand or obtain the application or benefit of an arbitration clause contained in the said contracts.

This Court, in the case of *The Atlanten*, 252 U. S. 313, and the House of Lords in the cases of *Jureidini* v. *Na-*

tional British and Irish Millers' Insurance Company, Limited (1915), A. C. 499, and *Hirji Mulji* v. *Cheong Yue Steamship Company, Limited* (1926), A. C. 497, has already decided this question in the negative and the decision of the Circuit Court of Appeals in the within case is in accordance therewith.

2. Whether the Circuit Court of Appeals has the power to remand a cause to the District Court with directions to exercise its discretion (on all the proofs which the parties may choose to present) in regard to retention of jurisdiction, when the Record shows that a great hardship would be imposed upon one of the parties by the Court declining jurisdiction.

A denial of the writ is justified by *either* the answer of the first question in the negative or the answer of the second question in the affirmative.

ARGUMENT.

POINT I.

Petitioner has not established its right to the writ of certiorari.

The prerequisites for the granting of a writ of certiorari were succinctly stated in the case of *Magnum Import Co.* vs. *DeSpeturno Coty*, 262 U. S. 159, 163, where this Court said:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes: First, to secure uniformity of decision between those courts in the nine circuits; and second, to bring up cases involving questions of importance

> which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

An examination of the petition and brief in support of this application discloses no conflict between decisions of the Circuit Courts and the question involved is not of such importance as to require in the *public* interest a further hearing.

Proctors for petitioner have heretofore stated under oath to the District Court (Statt, 100):

> "* * *. *There is no American interest whatsoever in any way concerned with the matter.*"

The only American interests involved are those of the respondents herein and the convenience of American witnesses at New York (C. C. A. Op. p. 147; 189-196; 215, 216; 218-228; 174; 176), all of which interests would be best subserved by a denial of the petition herein.

The decision of the Circuit Court of Appeals in the within case follows, and is in accordance with, the decision of this Court in *The Atlanten,* 232 Fed. 403, affirmed 250 Fed. 935, C. C. A. 2; affirmed by this Court, 252 U. S. 313, and is in accordance with the principles of law laid down by the House of Lords in *Jureidini, supra,* and *Hirji Mulji, supra* (C. C. A. Op. p. 146), and which principles of law continue to be recognized by the courts of this country and Great Britain.

Furthermore, the Circuit Court of Appeals, by its judgment herein, remanded the cause to the District Court with instructions to exercise its discretion in regard to retention of jurisdiction, and, if it should deter-

mine to retain jurisdiction, to decide the cause on the merits (C. C. A. Op. p. 147).

Petitioner, in its purported "Statement of the Case," assumes ([b] bot. p. 10, top p. 11 P. B.*) the existence of a fact which petitioner has heretofore denied, viz., that this matter arose out of and while the charter party was in full force and effect, and further erroneously assumes that it had made part performance of the contract. Petitioner has made no performance whatsoever under the contract, repudiated the charter party prior to the commencement of the action herein, and has denied the very existence of the contract (Statt, 106; C. C. A. Op. p. 146).

Relative to petitioner's question (a) (bot. p. 10 P. B.), the facts found by the Circuit Court of Appeals (C. C. A. Op. pp. 146, 147), and which facts are overwhelmingly supported by the Record, clearly show that the District Court abused its discretion.

Clear principles of law compelled the Circuit Court of Appeals to decide as it did. Neither courts nor litigants will be benefited by a further hearing in this case, and, consequently, there is no ground for the issuance of the writ prayed for.

POINT II.

The Circuit Court of Appeals was correct in reversing the District Court for error of law in relegating the parties to arbitration in London.

The District Court, by its order of April 29, 1940 (Vol. II, pp. 127-128) directed that there be included in the record on appeal a statement to the effect that proctor for petitioner "stated in words or in substance" that

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*References to Petitioner's Petition and Brief will be designated as p. — P. B.

upon the termination of the proceedings herein petitioner would appear in arbitration in London. In its memorandum decision of the same date, the District Court stated (op. Vol. II, fol. 378):

> "* * *. *The Court placed reliance upon that statement and declined jurisdiction.*"

The aforesaid alleged statement was *oral,* was *disputed* by proctors for respondents, was claimed to have been made at a hearing (in chambers) at which, *with the knowledge and consent of proctors for petitioner, no minutes were taken stenographically.* (Official Court Reporter Chadsey, Vol. II, fols. 374-375; Assignment of Error No. 8, sub-divisions 1, 2, and 3, Vol. II, fols. 408-411; Affidavit, Samuel C. Otto, verified April 18, 1940, on file in the District Court.)

The said "statement" was neither mentioned in nor supported by any affidavit until approximately 77 days after it was alleged to have been made and 51 days after the entry of the final decree and long after the appeal to the Circuit Court of Appeals was taken.

The District Court not only erred in declining jurisdiction in reliance upon such a "statement" but *also erred in assuming that petitioner was entitled to the application and benefit of the arbitration provision of the contract of charter.*

The District Court, after referring to the arbitration provision (Op. 234), stated (Op. 235):

> "This Court, therefore, should decline jurisdiction (citing cases) and the parties should be relegated to arbitration in London."

Nowhere, in the notice of motion or in the affidavits submitted in support thereof, *is there any request on the part of petitioner for arbitration* (141, 142; 247, 248).

Petitioner, in its affidavits in support of its motions, *affirmatively denied the very existence of the contract containing the arbitration provision* (Statt, 105, 106).

Furthermore, petitioner repudiated the contract of charter, failed and refused to load respondents' cargo, and terminated said contract (Libels, 65-72; Statt, 105, 106; Exhibit "C" this brief).

The Circuit Court of Appeals has specifically found (C. C. A. Op. p. 146):

> "* * *. The record indicates that *there was a repudiation of the amended charterparty by the respondent (petitioner) which was evidently doing everything it could to get higher freight rates on a rising market. Moreover it had already repudiated the original charterparty of August 17, 1939, for supposed lack of consideration* and had entered into the amended one of November 18, 1939, upon obtaining from the libellants an agreement to pay about double the original freight rates. *Even after obtaining this great concession the respondent (petitioner) soon began to insist that performance was impossible* because it could not load the ship at Montreal as that port was closed for the winter and *shortly afterwards took the technical position that it would not accept libellants' suggestion that it load their cargo at New York because under the terms of the charter it was not required to do so.* It followed this by entering into engagements with a new charterer for another European voyage. * * *. *Before the libel was filed the charterparty had already been repudiated by the respondent (petitioner), and the latter had insisted that the voyage was frustrated by the closing of the St. Lawrence River for the winter.* * * *."

By its new charter to others petitioner obtained a net freight of approximately $68,800 more than the freight provided for in respondents' amended charter, the voyage being from New York to Antwerp and/or Rotterdam, the identical ports of destination provided for in respondents' amended charter (218, 224; 227; Libel, 65-66; 71-72; Libel, Exhibit "B," 85-87).

The law is well settled that an arbitration clause does not survive a general repudiation of the contract, and that by denying the very existence of the contract containing the arbitration clause, by completely failing and refusing to commence performance of the contract, and by terminating the contract, petitioner waived any right to the application or benefit of the arbitration clause.

The Circuit Court correctly held (C. C. A. Op. bot. pp. 145, 146):

> "It seems clear to us that the libellants have shown that this is not a case in which the arbitration provided for in the charterparty can be regarded as a condition upon the maintenance of the cause of action. * * *. Under such circumstances it seems clear that the arbitration clause had no application to the right of the libellants to maintain the present suit. The decision of the Supreme Court in *The Atlanten*, 252 U. S. 313, and the rulings of the House of Lords in *Jureidini* v. *National British and Irish Millers' Insurance Company, Limited* (1915), A. C. 499, and *Hirji Mulji* v. *Cheong Yue Steamship Company Limited* (1926), A. C. 497, indicate that the parties should *not* have been relegated to London for arbitration. * * *. Accordingly the arbitration clause became wholly inapplicable to the case."

* * * * *

(Bot. p. 146, top 147)

"* * *. As Holmes, J., said in *The Atlanten*, 252 U. S. at p. 316:

'The clause obviously referred to disputes that might arise while the parties were trying to go on with the execution of the contract—not a repudiation of the substance of the contract. * * *' "

In *The Atlanten, supra*, a libel was filed in admiralty by the charterer to recover from the owner damages for the breach of a charter party. The respondent owner pleaded (232 Fed. 403, at 404):

"First. That the charter party had been made in Denmark, between two corporations of Sweden and Denmark, and that the charterer had made no tender of arbitration under an arbitration clause, valid in Denmark and Sweden, which reads as follows: '(21) If any dispute arises, the same to be settled by two referees, one appointed by the captain and one by charterers, or their agents, and, if necessary, the arbitrators to appoint an umpire. The decision of the arbitrators or umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight.' "

Judge Learned Hand, in awarding to libellant a final decree against respondent, stated in part as follows (404, 405):

"* * *. It is clear that the respondent did not intend to rely upon the clause in the letter of January 8, 1915, and did not suppose the case was one for arbitration at all. What it did rely on was the

penalty clause, under which it thought itself protected, and which made it to its interest to repudiate as soon as freight got above 34 shillings. The attempt at justifying this repudiation wholly falls. The respondent violated its contract without any shadow of excuse. It even made the proposal to the libellant to take a new charter at 60 shillings, the libellant to bear the difference between that and the supposed limitation of liability. Any effort to mitigate this violation of good faith on the score of danger to the ship is answered by this proposal to undertake the same voyage."

* * * * *

"*The withdrawal was before the voyage began, even before the ship had been delivered.* Whatever be the rule applicable to arbitration clauses of more general form, there can be no doubt that this clause was meant to apply only to disputes which might arise during the voyage, and while the parties were at least trying to go on with its execution. *Indeed, the only authority upon the subject which has been cited seems to make it a general rule that such clauses do not survive a general repudiation of the contract. Jureidini* v. *National British Millers' Ins. Co.* (1915), A. C. 499. The theory appears to be that such a provision is part of the execution of the contract, a piece of its administration, and ought not to be construed as applicable to an entire change of purpose which results in the abandonment by one party of the enterprise as a whole."

Mr. Justice Holmes, in delivering the unanimous opinion of this Court, stated (252 U. S. 313, 315):

"With regard to the arbitration clause we shall not consider the general question whether a greater effect should not be given to such clauses than for-

merly was done, since it is not necessary to do so in order to decide the case before us. *For this case it is enough that we agree substantially with the views of Judge Learned Hand in the district court and Judge Hough in the circuit court of appeals. Their opinion was that the owner repudiated the contract and that the arbitration clause did not apply.* It is true that it would be inaccurate to say that the owner repudiated the contract *in toto*, for the letter that we have quoted assumed that the contract was binding, and referred to it as fixing the liability incurred. It meant simply that the owner would not proceed with the voyage. *United States* v. *McMullen*, 222 U. S. 460, 471, 56 L. ed. 269, 273, 32 Sup. Ct. Rep. 128. But we agree that such a refusal was not a 'dispute' of the kind referred to in the arbitration clause."

(316)

"* * *. The clause obviously referred to disputes that might arise while the parties were trying to go on with the execution of the contract,—not to a repudiation of the substance of the contract, as it is put by Lord Haldane in *Jureidini* v. *National British & I. M. Ins. Co.* (1915), A. C. 499, 505, (1915) W. N. 6, 84 L. J. K. B. N. S. 640, 112 L. T. N. S. 531, 31 Times L. R. 132, 59 Sol. Jo. 205. * * *"

* * * * *

"* * *. *We are of opinion that the decree was clearly right.*"

Had petitioner herein not repudiated the contract, and had petitioner tendered the S/S Wilja at the loading port, and had the dispute occurred while petitioner was trying to go on with the execution of the contract, petitioner would have been entitled to the benefit of the arbitration provision. The Circuit Court of Appeals recog-

nized such distinction in the case of *In re Utility Oil Corporation,* 69 Fed. (2) 524, 525, 526 (C. C. A. 2).

In *Jureidini* v. *National British & Irish Millers' Insurance Company, Limited, supra,* the House of Lords had before it an action at law by an assured on a policy of insurance which contained an arbitration clause. The defendant repudiated the claim *in toto* on the ground of fraud and arson, the effect of which, if they were right, was to cause the plaintiff to forfeit all benefit under the policy.

The case was tried before Darling, J., and a special jury who found for the plaintiffs, the Court giving judgment in amount of £3000.– The Court of Appeals reversed on the ground that the arbitration clause was a bar to the action.

The House of Lords reversed the Court of Appeals, Viscount Haldane, L. C., stating (504, 505):

> "Now, my Lords, no doubt it is true that the policy contains an arbitration clause with a very stringent addition to it, to the effect that the going to arbitration is a condition precedent to the right to sue; and if that had been all,—if the action had been brought upon a policy containing such a clause and no more had happened,—then, on principle and on authority, the claim could not have been maintained without fulfilling the condition precedent; because by the law of this country you can make most contracts which you desire, and, among others, a contract that you will not come under liability under a contract unless that liability is defined in a particular way, it may be by an arbitrator. * * *. But the present case, as I have already pointed out, is different; there has been in the proceedings throughout a repudiation on the part of the respondent of their liability based upon charges of fraud and arson, the effect of which,

if they are right, is that all benefit under the policy is forfeited. * * *"

* * * * *

"Now, my Lords, speaking for myself, *when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced.* * * *, *the arbitration clause having gone with the repudiation.*"

Lords Dunedin, Parker, Parmoor and Atkinson concurred.

The principle of law laid down in the cases of *The Atlanten* and *Jureidini* (*supra*) has continued to be recognized and, as late as 1938, the Court, in the case of *Canadian Gulf Line, Ltd. (The Soloy)*, 98 Fed. (2) 711, 714, C. C. A. 2, cited by petitioner to the Circuit Court of Appeals as well as to this Court (p. 31 P. B.), held:

"There was no repudiation of the charter-party such as was held to preclude resort to the arbitration clause in *The Atlanten*, 252 U. S. 313, 40 S. Ct. 332, 64 L. Ed. 586, nor was there a repudiation by way of defense going 'to the substance of the whole contract' as in *Jureidini* v. *National British and Irish Millers' Insurance Co., Ltd.* (1915), A. C. 499, 505."

In the case of *Hirji Mulji, supra*, the House of Lords stated (502):

"As the arbitrator was the judge, if at all, both of law and fact, the sole question is whether he had any jurisdiction to decide, as he purported to do, between the parties. This depends on the question whether or not there was any submission, *and that again on the question whether, at the time when it*

purported to be submitted to him, there was a dispute, subsisting between the parties, 'under this charter,' that is, a contract then subsisting.

That a person before whom a complaint is brought cannot invest himself with arbitral jurisdiction to decide it is plain. His authority depends on the existence of some submission to him by the parties of the subject matter of the complaint. For this purpose *a contract that has determined is in the same position as one that has never been concluded at all. It founds no jurisdiction.*"

* * * * *

(bot. 510, 511)

"* * *. An arbitration clause is not a phoenix, that can be raised again by one of the parties from the dead ashes of its former self. By its very terms, as well as by the fact that it was only one part of the indivisible charter, it had come to end also; it is unnecessary to consider in what terms, if any, a clause might have been framed which would have saved the clause alive in the event of the frustration of the adventure and the charter. It may be noted that in practically all the numerous cases of frustration of charters by requisitioning during recent years, the charter must have contained an arbitration clause, yet no point of this kind has apparently been raised on any ordinary form of charter. *The cases in general afford little support to the idea that any form of clause would survive the contract as a whole*: see *Edward Grey & Co.* v. *Tome & Bunge* (1914) 31 Times L. R. 137, 138 and *In re Hohenzollern Co.* (1886) 54 L. T. 596, 597, and conversely *Kennedy* v. *Barrow-in-Furness Corporation* in the Court of Appeal, reported in *Hudson on Building Contracts* (1909) Vol. ii, 4th ed., 411, 415."

(512)

"* * *. As for *Jurcidini's* case (1915) A. C. 499, insurers pleaded the absence of an award as to quantum only as a fatal nonfulfilment of a condition to the right to sue on a policy. As they had themselves repudiated the claim *in toto*, it was held that they could not insist on the absence of an award. It is a case of approbation and reprobation: see *Macaura* v. *Northern Assurance Co.* (1925) A. C. 619, 631.

Their Lordships' conclusion is that the arbitrator acted without jurisdiction and that the action on his award ought to have failed, * * *."

In the case at bar, as we have heretofore shown, petitioner not only abandoned the contract, repudiated the contract, terminated the contract, and refused to load and carry respondents' cargo, but even went so far, upon the motions, to state under oath (Herbert M. Statt, 106):

"Libellants, therefore, are in the position of suing upon a contract which does not exist."

It is respectfully submitted that the Circuit Court of Appeals was correct in reversing the District Court for error of law in relegating the parties to arbitration in London.

POINT III.

The District Court, by declining jurisdiction, abused its discretion and failed to exercise a sound discretion, and the Circuit Court of Appeals was correct in reversing the District Court.

As we have heretofore shown, the District Court erred in assuming that petitioner, despite its complete repudiation of the contract of charter, was entitled to the ap-

plication or benefit of the arbitration clause contained in the said charter.

But, even apart from and in addition to the above error of law, the District Court, in declining jurisdiction, abused its discretion and failed to exercise a sound discretion.

"Discretion," when invoked as a guide to judicial action, means a sound discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result (*Langnes* v. *Green*, 282 U. S. 531, 75 L. Ed. 520, at 526; Headnote 7).

The law is well settled that whether an admiralty court will take jurisdiction of suits between foreigners is a matter entirely within its discretion, and such suits will be entertained, unless some special reason is shown why the court should deny its aid.

Fairgrieve v. *Marine Insurance Co.*, 94 Fed. 686, 687, certiorari denied, 186 U. S. 484, 46 L. ed. 1261;

Danielsen v. *Entre Rios Rys. Co.*, 22 F. (2) 326, at Point (I), 327;

Panama R. Co. v. *Napier Co.*, 166 U. S. 280, 285, 17 S. Ct. 572, 41 L. ed. 1004;

The Belgenland, 114 U. S. 355, 5 S. Ct. 860, 29 L. ed. 152;

The Pesaro, 255 U. S. 216, 41 S. Ct. 308, 65 L. ed. 592;

The Fredensbro (D. C.), 18 F. (2d) 983, 1927 A. M. C. 1258;

Dominion Combing Mills v. *Canadian Pacific Ry.* (D. C.), 300 F. 992.

The case of *The Mandu* (C. C. A. 2), 102 Fed. (2) 459, involved a collision between the Brazilian steamer "Mandu" and the German steamer "Denderah" in Brazilian

waters. The "Denderah" went down and most of its cargo was lost. The Court, in reversing the District Court, stated (462):

> "(3-5) 2. The petitioner attempts to support the result below as an exercise of the power of the court to decline jurisdiction in a case where the interests concerned are foreign. * * *. So for jurisdictional purposes the case may be treated as one where the adversaries were German shippers on the one side and a Brazilian ship owner on the other. On such a basis the foreigners interested were of different nationalities; they had no common home to which they might be sent to try their case; no agreement had been made that litigation be carried on in a particular country. Under these conditions it would have been unusual to have declined jurisdiction even at an early stage. * * *"

In the case at bar, respondents and petitioner are of different nationalities; they have no common home forum to which they might be sent to try their case; chaotic conditions in Europe render it impracticable, if not entirely impossible, to obtain a determination of the issues herein by arbitration in London or by suit in Finland or England; almost all of the evidence required to try the within action is available at New York and is not available elsewhere (189-196; 215, 216; 218-228; 174; 176); the repudiation and breaches of the charter party occurred at New York; material and necessary witnesses are available at New York and are not readily available elsewhere; and no agreement has been made that litigation should be carried on in any particular country.

The within action was instituted in the only forum in which respondent could obtain jurisdiction over petitioner.

After the original contract was entered into the petitioner refused to allow the S/S Wilja to proceed to any belligerent port. It was therefore impossible to obtain jurisdiction over the petitioner in either Great Britain or France by the attachment of the S/S Wilja.

Since the District Court's decision (but prior to the entry of the final decree herein) the S/S Wilja was sunk (Vol. II, 412), and it is now impossible to obtain jurisdiction over the petitioner by the attachment thereof in any jurisdiction.

The Circuit Court of Appeals has specifically found (C. C. A. Op. p. 147):

> "* * *. In view of the widespread conflict in Europe and the chaotic conditions there it would seem a great hardship to the libellants for our courts to decline jurisdiction and thereby to require them to bring suit either in Finland or England. Proof of damages could apparently be readily obtained in New York. The repudiation of the charterparty was there and, if the seaworthiness of the vessel should become a factor in the litigation, proof of her condition could be most easily secured from New York witnesses, since the repairs were conducted there in November and December, 1939, and the condition of the Wilja must have been there known. * * *"

These findings are overwhelmingly supported by the record and are not inconsistent with any findings by the District Court.

Unless the decision of the Circuit Court of Appeals is sustained, and jurisdiction over petitioner is retained, respondents will be denied a hearing of their claim in any forum, and will be deprived of the security heretofore obtained by the attachment of the S/S Wilja, now sunk,—all of which will result in a complete denial of justice to respondents.

POINT IV.

By affirmatively invoking the jurisdiction of the District Court to pass upon the merits of the within action, respondent waived any right or personal privilege to object to the jurisdiction of the District Court, and the District Court erred in failing to dismiss respondent's concurrent motion for an order declining jurisdiction.

Petitioner, itself, affirmatively invoked the jurisdiction of the District Court to pass upon the merits of the within action, and moved for an order dismissing the libel for alleged failure to state a cause of action.

By order to show cause, dated December 19, 1939, petitioner moved the District Court for an order (90, 91):

"(1) Declining to take jurisdiction herein,
(2) Dismissing the libel herein for lack of jurisdiction, and
(3) *Dismissing the libel herein on the ground that it does not allege facts sufficient to constitute a cause of action,* * * *."

In support of the motions petitioner submitted two affidavits of Herbert M. Statt, wherein petitioner alleged under Points II and III (102-108) that:

> "Since, therefore, no warranty exists, the libel does not state facts sufficient to constitute a cause of action and should be dismissed" (103), and
>
> "As above stated, the suit is against the wrong respondent (petitioner), it is brought in the wrong jurisdiction, and the libel does not set forth a sufficient cause of action" (106, 107).

On the argument of the motions, and in the briefs submitted to the District Court, petitioner argued the merits

of respondents' cause of action and invoked the jurisdiction of the District Court, on the merits, to dismiss respondents' cause of action, alleging that the libel failed to state facts sufficient to constitute a cause of action (Argument before District Court, Dec. 28, 1939, Vol. II, pp. 115-125).

Proctors for respondents were compelled to and did meet, on said motions, the issues raised by petitioner on the merits.

The District Court, in its opinion dated January 26, 1940, in describing the motions before it, stated (Op. 230):

> "The respondent (petitioner) has appeared specially herein and made a motion for an order that the Court decline to take jurisdiction, that the libel be dismissed for lack of jurisdiction, *and that the libel be dismissed on the ground that it does not allege facts sufficient to constitute a cause of action.*"

The law is well settled that a party may not say that he is not properly before the court, and in the same breath argue that, if he be, there is no ground to hold him. The courts have found an inconsistency in such an attitude which has led them to insist that a motion upon the merits presupposes that the party is before the court.

As was stated by Parker, C. J., in the case of *Gulf Smokeless Coal Co., et al.* v. *Sutton, Steele & Steele, et al.*, C. C. A. 4, 35 Fed. (2) 433, 439:

> "* * *. There can be no question that such a motion, which invokes the judgment of the court as to the sufficiency of the pleading, amounts to a general appearance. Even though it be coupled with a motion to dismiss on jurisdictional grounds, it waives the question of jurisdiction; for one will not be heard to invoke and deny jurisdiction in the same breath.

Jones v. *Andrews,* 10 Wall. 327, 332, 19 L. Ed. 935; *St. Louis & S. F. R. Co.* v. *McBride,* 141 U. S. 127, 11 S. Ct. 982, 35 L. Ed. 659; *Edgell* v. *Felder* (C. C. A., 5th) 84 F. 69; *Christensen* v. *Christensen* (D. C.), 14 F. (2d) 475; *Nelson* v. *Husted* (C. C.), 182 F. 921; *Cyclopedia of Federal Procedure,* Vol. 3, p. 427."

Also see:

Armstrong, et al. v. *Langmuir, et al.,* 6 F. (2d) 369 at 371 (C. C. A. 2);

Kunglig Jarnvagsstyrelsen v. *United States,* 19 F. (2d) 761 at 762, 763 (C. C. A. 2);

Thames & Mersey Ins. Co. v. *United States,* 237 U. S. 19, 35 S. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087.

As long ago as 1818 it was recognized that the filing of a plea to the merits constituted a waiver of any exception to the jurisdiction.

Mr. Justice Story, in overruling exceptions to the jurisdiction, in *The Abby,* Fed. Cas. 14, stated:

> "He has regularly filed a plea claiming the property and traversing the allegations of forfeiture in the libel. * * * A plea to the merits is an admission that the jurisdiction of the court is well founded; * * *."

Also see *The Ucayali,* 159 Fed. 800, E. D. N. Y., a case involving a suit by a foreign subject against a vessel of his own country, wherein it was held by Judge Chatfield that the right to object to the assumption of jurisdiction by a court of admiralty of the United States is waived by a general appearance and the filing of an answer by the claimant.

Petitioner, having affirmatively and concurrently invoked the jurisdiction of the court to pass upon the

merits of the within action, waived any right or personal privilege to object to the jurisdiction of the court.

The District Court, therefore, erred in failing to dismiss petitioner's motion for an order declining jurisdiction, and erred in failing to hold that petitioner had waived any right or personal privilege to object to the jurisdiction.

This matter was raised by respondents in the court below (Assignments of Error 1, 2, 3; 276-280) but was not passed upon by the Circuit Court of Appeals which reversed the District Court on other grounds.

POINT V.

Further answering the petition and brief of petitioner.

Answering the Petition.

The petition and brief in support of the petition do not sufficiently, fairly or correctly state the facts or issues.

It is refreshing to note that petitioner admits the District Court had jurisdiction (p. 4 P. B.). Upon the motions it requested an order dismissing the libel for alleged lack of jurisdiction (90; C. C. A. Op. p. 145).

The opinion of the District Court, instead of reciting "the undisputed facts," as claimed by petitioner (p. 4 P. B.) omitted and failed to consider the decisive, material and controlling facts, many of which are set forth in the opinion of the Circuit Court of Appeals (C. C. A. Op. pp. 145-147), and which omission on the part of the District Court was cited as error by respondents (Assignment of Error No. 15, 287-295).

It is significant that petitioner, in quoting from the opinion of the Circuit Court of Appeals (bot. p. 5 P. B.) has omitted these material facts.

This omission can hardly be claimed to be an accident, especially since petitioner (bot. p. 9, top p. 10 P. B.) again incorrectly states:

> " * * *. The material facts were not controverted and are set out in the Court's opinion, (referring to the District Court) * * *"

and again incorrectly states (p. 10 P. B.):

> "The facts are sufficiently stated in the petition, *supra*, at pages 1 to 5."

Petitioner has not established its right to the writ of certiorari (Point I herein).

Can it be that the "solemn agreement" referred to by petitioner (middle p. 6 P. B.) is intended to mean the contract of charter involved in this action and which petitioner abandoned, repudiated, terminated, refused to perform (C. C. A. Op. p. 146, Exhibit C, this brief), and which petitioner's own attorney heretofore, under oath to the District Court, claimed "does not exist" (Statt, 106). Or can it be that the contract of charter has the attributes of a chameleon—changing its characteristics with the exigencies of the moment?

The decision of the Circuit Court of Appeals corrected the obvious error of the District Court and remanded the cause to the District Court with instructions to exercise its discretion in regard to retention of jurisdiction (C. C. A. Op. p. 147).

From the facts found by the Circuit Court of Appeals, all of which are overwhelmingly supported by the Record, it is obvious that the District Court, in declining jurisdiction and relegating the parties to arbitration, not only had made an error of law but also had failed to exercise a sound discretion.

Answering Petitioner's Brief.

In its brief to this Court petitioner has *incorrectly* stated:

1. "The shipowner (petitioner) at no time repudiated the contract sued on * * *." (p. 23 P. B.)
2. "* * *. It (petitioner) made no suggestion that the contract or any of its terms, were illegal or unenforceable, and at no time did it repudiate the arbitration clause of the contract * * *." (p. 23 P. B.)
3. "* * *. The reason that the *Wilja* did not carry out its contract with respondents was simply because the intervention of winter and the consequent closing of St. Lawrence River navigation made performance of the contract impossible, despite petitioner's honest endeavor to comply with its legal obligations." (p. 26 P. B.)
4. "* * *; that the shipowner (petitioner) declined to agree to make an entirely different voyage from New York to the Continent; * * *." (p. 22 P. B.)
5. "* * * that on November 20, 1939, the *Wilja*, in accordance with directions of the charterer, left New York, where she happened at that time to be, and proceeded towards Montreal in ample time to make her cancelling date of November 28th; that after departing from New York, owing to an accident to her machinery, she was compelled to put back to New York for repairs; * * *." (top p. 22; also see p. 3, p. 25 P. B.)

In the affidavit of its counsel submitted upon the motions petitioner stated (Herbert M. Statt, 105):

> "* * *It thus appears that the charter party is not a contract at all and that it is at most an illusory contract which will not be binding upon the parties. * * *"

(106)

> "* * * Libellants, therefore, are in the position of suing upon a contract which does not exist."

In the letter of December 15, 1939, delivered to respondents proctors *prior to the commencement of the within action* petitioner's proctors stated that *performance under the charter party had become impossible* and terminated the contract, and suggested that respondents institute action immediately (Exhibit "C" annexed to this brief; C. C. A. Op. p. 146).

The common object or purpose of the charter party was to transport respondents' cargo to Antwerp and/or Rotterdam upon the payment of a certain freight therein specified. This object or purpose was not frustrated or rendered impossible, since respondents were agreeable to load their cargo at New York, where the *Wilja* then was located, and which would save to petitioner the expense of proceeding light to Montreal.

Petitioner's refusal to load at New York (or any other U. S. Atlantic port), combined with its contracting with others to carry cargo from New York (to the identical ports of destination provided for in respondents' charter) at a freight about $68,800 more than provided for in the amended charter, clearly refutes petitioner's claim that it made an honest endeavor to comply with its legal obligations.

As was stated in *Scrutton on Charter Parties and Bills of Lading*, Thirteenth Edition, 1931, page 117:

> "* * *. The phrase, especially in its commoner and fuller form, 'frustration of the commercial purpose of the adventure', is perhaps a little unfortunate. A slight variation, in phrase or thought, makes it 'the common purpose', and this suggests that the event, which has happened, or has failed to happen, must

> defeat *both* the respective objects for which the *two* parties made the contract, or must destroy the benefits which *both* respectively were to secure under it. But this can happen rarely, if ever: in most cases the object of one party—to receive payment for goods sold, or for services rendered, or the like—is fully capable of fulfillment."

The Circuit Court of Appeals has found (C. C. A. Op. p. 146):

> "* * *. The record indicates that there was a repudiation of the amended charterparty by the respondent (petitioner) which was evidently doing everything it could to get higher freight rates on a rising market. * * *"

That the petitioner agreed to cause the *Wilja* to sail forthwith from the port of New York upon its release from attachment on November 18th is not only supported by respondents' allegation in the libel (71, 72), but is confirmed by petitioner's proctors letter dated *November 17,* (Exhibit "D" annexed to this brief).

Although the captain of the *Wilja* was called by petitioner and testified (Vol. II, 106-108), and although ample opportunity was granted to petitioner to answer the affidavits submitted by respondents and contained in the Record (pp. 41-54; pp. 56-76; pp. 81-84) no testimony was adduced nor affidavits submitted to show either that the *Wilja* sustained an accident to her machinery or that she was compelled to put back to New York for repairs.

Petitioner's arguments, which are based upon its incorrect, unsupported and contradicted statement of "facts" are unreliable and without merit.

"A"

Answering Petitioner's Point I.

In *Fairgrieve, et al.* v. *Marine Ins. Co. of London*, C. C. A. 8, 94 Fed. 686, certiorari denied, 186 U. S. 484, the court held (687):

> "* * *. It is the settled law of this country that our admiralty courts have jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, and the ship or party to be charged is within the jurisdiction of the court. It is a jurisdiction the court may decline to exercise where, for some special reason, it appears to be inexpedient to exercise it, but there is no fact disclosed by this record that would justify the district court in declining to take jurisdiction of this case. 2 Pars. Mar. Law, 543; *Taylor* v. *Carryl*, 20 How. 611; *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860; *Enos* v. *Sowle*, 2 Hawaii, 332; *Warren* v. *The Benjamin Rush*, *Id.* 478."

It is respectfully submitted that this is still the well settled law.

The cases relied upon by the District Court in declining jurisdiction and which are referred to and cited by petitioner (pp. 9-13 P. B.) are clearly distinguishable from the case at bar.

Canada Malting Co., Ltd. v. *Paterson Steamships, Ltd.*, 285 U. S. 413, involved an action between four *Canadian corporations* arising out of a collision between two *Canadian vessels* for loss of cargo loaded at a *Canadian port* under a bill of lading providing for delivery of the cargo at another *Canadian port*. The officers and crew of each vessel, being material witnesses, were citizens and resi-

dents of *Canada* and so would not be available for compulsory attendance in the United States District Court. Respondent in said action had, prior to the institution of the suit in the United States District Court, instituted a proceeding in the Admiralty Court of *Canada* for the judicial determination of its liability as between the colliding vessels.

This Court, affirming the District Court's order declining jurisdiction, stated (285 U. S. 413, at 424):

> "* * *. The District Court embodied in the decrees an order that the respondent should appear and file security in any action which might be instituted by the petitioners in the admiralty courts of Canada, so that petitioners would not by dismissal of the libels lose the security gained by the foreign attachment."

In *Malcomess & Co., Ltd.* v. *S/S New Texas and Elder Dempster & Co., Ltd.*, 1926 A. M. C. 1514, the action was brought by a *British subject against a British vessel* for damage to cargo loaded on said vessel while being transported on a voyage from Canada to South Africa, *all* of the *witnesses being located in Canada.*

In *United States Merchants' & Shippers' Ins. Co.* v. *A/S Den Norske Afrika Og Australie Line*, 1 Fed. Supp. 934, affirmed 65 Fed. (2) 392, the respondent, a Norwegian corporation, was the owner of the S/S "Tricolor" which, together with her entire cargo, became a total loss near Colombo, Ceylon, due to a fire on board followed by explosions.

The S/S "Tricolor" had loaded various shipments of general cargo totalling 8,000 tons at *8 European ports.* The libellant insured but *one small* shipment for a Dutch national.

The bill of lading, issued in Hamburg, Germany, contained a clause stipulating that all questions arising under the bill of lading were to be governed by the law of Norway and were to be decided in Oslo. *All of the trans-*

actions occurred in foreign territory where all of the evidence had to be gathered. The District Court stated (top 935):

> "The supporting affidavits of the respondent indicate * * *; that the defense will be that no negligence occurred in the stowage of the cargo or otherwise, and this will involve investigation of facts and examination of witnesses, *all* of whom are remote from this jurisdiction. * * *. The unavailability of the witnesses and the hardship to the respondent of being compelled to litigate here and in disregard of the bill of lading agreement are urged as reasons for declining jurisdiction."

The only question raised before the Circuit Court of Appeals (65 F. [2] 392) was whether the libellant, an American insurance company suing as subrogee for a Dutch shipper, for loss of *one small* shipment, was entitled as a matter of right to have the court retain jurisdiction. The Circuit Court of Appeals stated (392):

> "(1) Both sides concede that had the Dutch shipper itself moved in the suit, jurisdiction would have depended upon the discretion of the court; each party would have been an alien, and the District Court is not obliged to try such cases; *its jurisdiction depends upon whether its exercise is essential to justice; whether the libellant is driven to seek it in order to secure any adequate redress at all. Canada Malting Co.* v. *Paterson S. S.*, 285 U. S. 413, 52 S. Ct. 413, 76 L. Ed. 837; *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515, 50 S. Ct. 400, 74 L. Ed. 1008; *The Belgenland*, 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152."

In *Goldman* v. *Furness, Withy & Co.* (D. C.), 101 Fed. 467, the libellant was suing under a colorable assignment from a certain person with respect to whom, only four days before in a similar action based on the same facts,

the District Court had rendered its decision declining jurisdiction. Upon the former libel filed by libellant's assignor, defendant *appeared specially* and filed affidavits showing that *no part of the contract was to be executed within the United States*, that the contract sued upon had been *partially performed*, that it was governed by the law of Canada, that *nearly, if not quite, all of the witnesses were in Canada and that the convenience of the parties would be greatly subserved by the trial of the cause in Canada rather than within this jurisdiction.* The United States Court was at that time over-burdened with domestic cases.

In *The Lady Drake*, 1 Fed. Supp. 317 (pp. 12, and 15, 16, P. B.) as will appear from the headnote:

> "All the real parties concerned except consignee's underwriters were Canadian concerns, and all witnesses were either in British West Indies, in Canada or on vessels trading between the British West Indies and New Brunswick, Canada, and vessel did not come to New York, and it appeared that it would be more convenient if case were tried in Canada than in United States."

In the case at bar, however:

1. *The parties have no common home forum,* being nationals of *different* countries.
2. *Practically all of the witnesses and evidence necessary for the trial of the within action are available at New York and are not readily available elsewhere* (189-196; 215-216; 218-228; 174; 176; 50; C. C. A. Op. p. 147).
3. *The widespread conflict and chaotic conditions in Europe render it impracticable, if not impossible, to try the issues herein in London or elsewhere in Europe.*

4. Petitioner herein itself invoked the jurisdiction of the District Court to dismiss the complaint on the merits.
5. Today, Federal Courts are not crowded by an excess of litigation.
6. Petitioner repudiated its contract and no cargo was ever loaded or carried on petitioner's steamship from any port.
7. *Justice requires that jurisdiction be retained.* If jurisdiction is finally declined the result, for all practical purposes, will be the same as if the within action had been dismissed on the merits, and that without any trial.

In *Cuba Railroad Co.* v. *Crosby*, 222 U. S. 473, 56 L. Ed. 274 (p. 13 P. B.), *the jurisdiction of the court was in no way involved.* The decision of this Court in that case was merely authority for the proposition, as will appear from the headnote, that:

> "The Federal courts cannot assume without proof that, under the law of Cuba, like that of the forum, a promise to repair or replace defective machinery, when notified by an employee of the defect, throws upon the master the risk of injury to such employee from such defect until the time for performance has expired, or that it does away with or leaves to the jury what otherwise would be negligence as a matter of law."

In that case plaintiff argued that it should not be compelled to prove the law of Cuba in order to prove his case. In denying the plaintiff's said contention this Court made the remarks quoted by petitioner.

"B"

Answering Petitioner's Point II.

The Circuit Court of Appeals *did not substitute* its discretion for that of the District Court but reversed for clear error of law and remanded the cause to the District Court (C. C. A. Op. p. 147).

Petitioner's arguments under Point II (p. 13 P. B.) are therefore inapplicable and are misdirected.

Petitioner, in quoting from the case of *Charter Shipping Co.* v. *Bowring, Jones & Tidy,* 281 U. S. 515, pp. 518-519 (p. 13 P. B.), has omitted from its quotation material parts of the decision which are hereinbelow italicized:

> "*Both the parties being British subjects, and the present litigation as well as the suit pending abroad, apparently involving the application of English law to the fund located there,* it was for the district court to say, as it did, upon a consideration of all the circumstances, whether it should decline 'to take cognizance of the case if justice would be done as well by remitting the parties to the home forum.'
>
> * * *. *While some witnesses as to seaworthiness were 'American repair men,' it does not appear that any were in or near the southern district of New York. The libel alleges that the Charterhague plied as a common carrier between American ports and London, where, so far as appears, her officers and crew would be available as witnesses as to the alleged unseaworthy condition of engines and boilers.* It was for the District Judge to consider the facts appearing and the inferences which he might draw from them, and reach his own conclusion as to the convenience of witnesses, as well as the other factors

upon which he decided that justice would be best served by leaving the parties to their suit in England."

It is obvious why petitioner omitted the parts which it did, even going to the extent of quoting a portion of a sentence.

It is further obvious that this Court predicated its said decision upon the facts of the said case, which are clearly distinguishable from those in the case at bar.

The case of *Pietraroia* v. *N. J. & H. R. R. & F. Co.*, 197 N. Y. 434, is authority for the principle that:

> "The powers of review of the Appellate Division comprehend the right to review an exercise of discretion by the inferior courts, and, equally, the right to exercise its own discretion, independently, when the facts or circumstances of the case are such as to justify it" (see headnote, 434).

"C"

Answering Petitioner's Point III.

Under its Point III (pp. 14-17 P. B.) petitioner argues the converse of respondents' Point III herein.

That the contract of charter involved herein was made for the account of the New York office of the respondents (187) is not and cannot be denied by petitioner.

Both the charters, Exhibit A and, as amended, Exhibit B, were signed "by authority of Charterers" who are specifically designated as "Louis Dreyfus & Co., of New York."

Petitioner has singularly omitted to call to the Court's attention the following provision on Exhibit A (R. p. 28, line 12), reading as follows:

> "Orders as to loading port to be given *on receipt of Master's application to 'SESOSTRIS-NEW YORK'* * * *" (Sesostris-New York being the cable address of respondents' New York office).

The words hereinabove italicized appear in the said charter in *handwriting and in ink*, and supercede both the printed and the typewritten portions of the contract.

While on the motions petitioner failed to answer or deny respondents' affidavits wherein it was shown:

> "Almost all of the evidence required to try the within action is available at New York, and is not readily available elsewhere (189-196; 215-216; 218-228; 174; 176)."

petitioner attempts to argue that it will require certain testimony of its ship's officers (p. 16 P. B.).

The ship's officers were at New York; in fact, the captain testified (Vol. II, p. 106-108), yet not one iota of testimony was adduced by petitioner as to the seaworthiness of the *Wilja*, whether due diligence had been exercised, or the reason why the *Wilja* had returned to New York, nor was the slightest testimony or evidence of any breakdown at sea elicited.

Upon the argument of the motions on both December 20th (333, 334) and December 28th (371, 372), and while the *Wilja's* crew was still at New York, the District Court suggested that petitioner take their testimony, which petitioner has failed to do, stating (334):

> "Mr. Statt: I do not want to incur expense."

The testimony of shipyard employees at New York, as well as respondents' experts, concerning the conditions found upon the return of the *Wilja* to New York (November 21) is more controlling and significant, and more truly indicative of the condition of the *Wilja* when it sailed on November 20th (C. C. A. Op. p. 147) than the

testimony of owner's representatives, surveyors or shipyard people in Gothenburg, as claimed by petitioner (bot. p. 16 P. B.).

In the affidavit submitted by proctor for petitioner (R. P. 34) cited by it, petitioner merely said that it *may* be necessary to take certain testimony. He did not make the statement (p. 16 P. B.) for which the reference is cited.

On the motions petitioner failed to deny respondents' allegation (Libel; 70) that petitioner would cause the *Wilja* to sail and proceed forthwith from the port of New York to St. Lawrence loading ports immediately upon release from attachment. Petitioner now attempts to assert (p. 17 P. B.) that it is of the "utmost importance" for it to obtain testimony in London with respect thereto.

Proctors for petitioner *know* that the respondents' allegation is correct, for they themselves have confirmed it in *their* letter to libellants' proctors dated *November 17*, 1939, wherein they state (Exhibit "D" annexed to this brief):

> "Confirming our advices by telephone this afternoon, Messrs. J. H. Winchester advise us that they are in receipt of a cable from owners reading as follows:
>
> 'AGREED WITH DREYFUS WHO RELEASING *SEND WILJA IMMEDIATELY* ST LAWRENCE AGENTS MONTREAL SHIPPING COMPANY'
>
> * * * * *
>
> Messrs. Winchester advise us that the vessel cannot sail tonight but they have requested us to do all we can to enable her to proceed at about *10 a.m. tomorrow.* Accordingly, we should have everything ready tonight so that arrangements can be made to release the vessel the first thing tomorrow morning."

"D"

Answering Petitioner's Point IV.

It was only *after* the District Court, in reliance upon an oral "statement" that petitioner would appear in an arbitration proceeding in London (Op. Vol. II, 378), had declined jurisdiction, upon the authority of *Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd., supra,* and had relegated the parties to arbitration in London (Op. 235) that respondents moved for reargument (237).

Upon said motion respondents requested that the Court condition its declination of jurisdiction by requiring the petitioner to appear and file security in the arbitration to which the parties had been relegated by the Court, or, in the alternative, to retain jurisdiction but stay the within action pending the hearing and determination of the arbitration in London (237-239).

Petitioner opposed the motion for reargument, and the District Court denied the motion.

Petitioner's suggestion (p. 18 P. B.) that respondents might effectively proceed alone with arbitration in London, in the event petitioner refuses to join and obtain a binding judgment with respondents' nominee acting as sole arbitrator, is contrary to the authority of *Hirji Mulji, supra.*

Any award obtained by respondents would be sterile, and the entire arbitration proceeding a hollow mockery, unless the security heretofore obtained by the foreign attachment is retained by respondents. Petitioner's refusal to furnish such security demonstrates its lack of a sincere desire to abide by and *pay* any award of arbitrators.

Even in *Canada Malting Co., Ltd., supra,* the offer on the part of respondent to furnish security in Canada was made in writing, under oath, and submitted to and filed

in the District Court. That this offer was a compelling factor in the Court's determination to decline jurisdiction is obvious from its decison and order, whereby the Court conditioned its declination by requiring respondent to appear and furnish security in Canada.

Even in *A/S Inger* vs. *Steamship Kanto Maru,* 1939 A. M. C. 1229, 1230, affirmed *1940 A. M. C. 1124,* C. C. A. 9th, wherein the Circuit Court found (bot. p. 1125):

> "Some of the pertinent matters shown by the affidavits which were considered by the court in the exercise of its discretion appear in its opinion. It appears therefrom that a *collision* occurred in the territorial waters of *Japan*; that navigation therein is controlled by the law of *Japan*; that the pilots in charge of the boats were *Japanese* pilots; that the libel in the *Japanese* admiralty court was promptly brought and was being diligently prosecuted; that both ships were foreign owned; that there was *no American cargo* aboard; that no *American insurance* company was involved in the loss; that there were *witnesses available in Japan* other than those on the two colliding ships; that although no cross libel had been filed by libellant in the proceeding pending in the Japanese Admiralty Court, consent was given by respondent to the filing of such a cross libel in that court."

the order declining jurisdiction was conditioned *not only by requiring the respondent to appear and furnish security for value in the Japanese action, but also by requiring respondent to furnish satisfactory assurances that any decree of the Japanese court would be satisfied by the payment of funds to libellant in Norway in Norwegian money.*

The conditions required by the District Court in its order went far beyond any legal right the libellant may

have had in Japan and far beyond any voluntary offer made by respondent.

It would therefore appear that in the within action the District Court was in error when it held (Op. 257):

> "* * *. There seems to be no authority for an order requiring the bond. * * *"

"E"

Answering Petitioner's Point V.

The Circuit Court of Appeals had a thorough conception of the decision of the District Court, as it indeed had of the entire record of the case, as will appear from its opinion.

The District Court's decision to relegate the parties to arbitration in London was a material part of its entire decision, and was the condition or basis upon which it arrived at the decision to decline jurisdiction, as will appear from the Court's decision above referred to (Vol. II, Op. 378).

The District Court not only declined jurisdiction but relegated the parties to arbitration in London (Op. 235).

Since petitioner by its motions had sought an order to dismiss the libel on the alleged ground that the libel failed to state a cause of action (90, 91) it became necessary to state in the final decree which of petitioner's motions had been granted, and to show that the dismissal was not on the merits.

"F"

Answering Petitioner's Point VI.

We have shown (pp. 28-30, this brief) that many of the facts upon which petitioner has based its arguments in its Point VI (pp. 22, 23, 25 and 26 P. B.) are incorrect, are unsupported by the Record, or are contradicted by the Record.

Petitioner likewise confuses the issues.

The damages sustained by respondents were caused by petitioner's repudiation of and refusal to enter upon the performance of its Charter of August 17th, and as amended November 18th.

That petitioner failed to tender the Wilja for loading is admitted. Petitioner seeks to excuse this failure upon various grounds including a claim (a) that it was not required to do so because there was no valid contract between the parties and that respondents were in the position of suing upon a contract that did not exist (106), and (b) that even if there had been a valid contract its performance was frustrated and rendered impossible and such contract had been terminated (Exhibit "C" this brief).

Petitioner's termination and repudiation of the contract raises the issue as to whether the charter party was a valid subsisting contract at the time when petitioner declared it to be terminated and *which issue may only be determined by the Court.* As was stated in *Hirji Mulji* (*supra*):

> "That a person before whom a complaint is brought cannot invest himself with arbitral jurisdiction to decide it is plain. His authority depends on the existence of some submission to him by the parties of the subject matter of the complaint. For this

> purpose a contract that has determined is in the same position as one that has never been concluded at all. It founds no jurisdiction."

The effect of the decision in the *Hirji Mulji* case, as was stated by the Harvard Law Review,

> "* * * is to deprive the arbitrator of effective jurisdiction of all disputes involving a question of impossibility, for if the arbitrator finds that there is no excuse, the losing party can always defend in an action on the award on the ground of lack of jurisdiction to make the award, and thus secure another trial on the very question in dispute." 40 Harv. L. Rev. 305.

The libel was filed *after* petitioner's repudiation and termination of the contract (C. C. A. Op. p. 146; Exhibit "C," this brief) and any attempted suggestion or inference to the contrary (p. 25 P. B.) is incorrect.

We have heretofore discussed *The Atlanten, supra,* cited by petitioner (pp. 24, 25, 27, 28 P. B.) and *The Soloy, supra,* cited by petitioner (pp. 27, 31).

In *Shanferoke Coal & Supply Corp.* v. *Westchester S. Corp.*, 70 F. (2d) 297 (C. C. A. 2), cited by petitioner (p. 27 P. B.), the Court considered and took into account the principles laid down in *Jureidini (supra)* and *The Atlanten (supra).* It was unnecessary to apply those principles to the facts of that case, as the opinion clearly shows.

The suggestion by respondent (p. 27 P. B.) that had *The Atlanten* case arisen subsequent to the enactment of the arbitration statute the decision might have been otherwise, is unsupported by the decision of *In Re Utility Oil Corporation, supra,* where a dispute arose after the shipowner had partially performed and while the shipowner was trying to continue performance of the contract.

Petitioner's repudiation and revocation of the contract and its denial under oath to the District Court of its existence, validity or enforceability (Statt, 105, 106) denies to petitioner any right to demand or obtain the benefit of the U. S. Arbitration Act or of the arbitration clause of the contract.

The cases of *A. Sanderson & Son* v. *Armour & Co., Ltd.*, 1922 Scotch Cases (House of Lords) 117; *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co., Ltd.* (1923), A. C. 480; *Macaura* v. *Northern Assurance Co., Ltd.* (1925), A. C. 619; *Tamplin (F. A.) Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited* (1916), 2 A. C. 397, cited by petitioner (pp. 28, 31 P. B.), were considered and distinguished by the Court in the case of *Hirji Mulji, supra.*

In none of the said cases was there a repudiation of the contract *in toto* as in *Jureidini, supra,* nor was there a denial of the existence of a valid contract. There was merely a denial of liability under the contract. The same distinctions are true of the cases of *Woodall* v. *Pearl Assurance Co., Ltd.* (1919), 1 K. B. 593, and *Golding* v. *London and Edinburgh Insurance Co., Ltd.* (1932), 43 Ll. L. Rep. 487, cited by petitioner on page 29 P. B.

The within is not a case where the respondents have merely alleged a repudiation of the contract by petitioner, but where the whole record clearly shows not one but a number of repudiations by petitioner of its contracts, as the Circuit Court has found (C. C. A. Op. p. 146) and the petitioner itself has denied the existence of the contract (106).

Petitioner's doubt (p. 30 P. B.) as to whether the House of Lords correctly decided the case of *Hirji Mulji* is as amusing as its attempted distinction of the principle of law expressed in the said case.

The question before the Court in the *Hirji Mulji* is not, as suggested by petitioner (top. p. 30 P. B.) but as stated in the said case, as follows (p. 502):

> "As the arbitrator was the judge, if at all, both of law and fact, the sole question is whether he had any jurisdiction to decide, as he purported to do, between the parties. This depends on the question whether or not there was any submission, and that again on the question whether, at the time when it purported to be submitted to him, there was a dispute, subsisting *between the parties, 'under this charter,' that is, a contract then subsisting.*"

It is respectfully submitted that the decision by the House of Lords in *Hirji Mulji* represents the clear British law on this subject.

CONCLUSION.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HENRY E. OTTO,
Counsel for Respondents.

SAMUEL C. OTTO,
of Counsel.

Exhibit C.

HAIGHT, GRIFFIN, DEMING & GARDNER

CABLE ADDRESS
MOTOR NEW YORK

JOHN W. GRIFFIN
HAROLD R. DEMING
KENNETH GARDNER
HENRY M. HEWITT
WHARTON POOR
STANLEY W. SCHAEFER
DONALD HAVENS
EDGAR R. KRAETZER
CHARLES S. HAIGHT JR.
HERBERT M. STATT
FRANK J. FOLEY

80 BROAD STREET
NEW YORK December 15, 1939

Messrs. Otto & Easterday
2 Broadway
New York

s/s VILJA-C/P AUGUST 17, 1939
Our file 163-46

Dear Sirs:

In response to your inquiry, we are instructed by owner to inform you that as United States ports are not within the range of the above dated charter party, owner declines to permit the vessel to load at New York or other U. S. Atlantic port.

It seems to us that inasmuch as Montreal, the port to which the vessel was originally ordered and to which she proceeded, is now closed, performance under the above dated charter party has become impossible and that, accordingly, it should be agreed upon between both parties that the charter party is terminated.

Under all the circumstances, therefore, we cannot imagine any reasonable theory upon which vessel and owner can be held liable for her inability to load under the above dated charter. If, however, your client nevertheless insists upon bringing suit, we suggest that it would

be highly advisable to institute action immediately so that owner and we may have time to make necessary arrangements and possibly avoid loss of time and other damage to vessel and owner.

Yours very truly,
HAIGHT, GRIFFIN, DEMING & GARDNER
By Herbert M. Statt
Herbert M. Statt

HAIGHT, GRIFFIN, DEMING & GARDNER

CABLE ADDRESS
MOTOR NEW YORK

JOHN W GRIFFIN
HAROLD S DEMING
KENNETH GARDNER
HENRY M HEWITT
WHARTON POOR
STANLEY W SCHAEFER
DONALD HAVENS
EDGAR R KRAETZER
CHARLES S HAIGHT JR
HERBERT M STATT
FRANK J FOLEY

80 BROAD STREET
NEW YORK

Exhibit D.

November 17, 1939

Messrs. Otto & Easterday
2 Broadway
New York

s/s "ILJA-CHARTER PARTY
DATED LONDON, AUG.17,1939

Dear Sirs:

Confirming our advices by telephone this afternoon, Messrs. J. H. Winchester advise us that they are in receipt of a cable from owners reading as follows:

"AGREED WITH DREYFUS WHO RELEASING SEND "ILJA IMMEDIATELY ST LAWRENCE AGENTS MONTREAL SHIPPING COMPANY"

Then follows reference to bunkering at Sydney which we did not copy accurately as it is immaterial to the questions involved. Messrs. Winchester advise us that they are preparing the vessel for sea and have given the master instructions to proceed to the St. Lawrence, so that it is obvious that owners' instructions are being acted upon.

We are informed by the National City Bank, 55 Wall Street Branch, that owners have on deposit at least $60,000. We have proposed to you that pending confirmation from your client that the libel is to be discontinued and the attachment released, you take the National City Bank's undertaking to substitute the cash security of $60,000 for your attachment on the vessel. We enclose herewith copy of letter which we have suggested National City Bank give you. Mr. Connors, who is in charge of the matter, advises that he is not yet prepared to state whether the Bank will issue such a letter but has promised to inform us by 4.30 p.m.

Messes. Winchester advise us that the vessel cannot sail tonight but they have requested us to do all we can to enable her to proceed at about 10 a.m. tomorrow. Accordingly, we should have everything ready tonight so that arrangements can be made to release the vessel the first thing tomorrow morning. Yours very truly,

HAIGHT, GRIFFIN, DEMING & GARDNER